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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 350

NORTHWESTERN BELL TELEPHONE COMPANY, *Appellants*,

v.

NEBRASKA STATE RAILWAY COMMISSION, *Appellee*.

MOTION OF THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE.

BRIEF OF SAID NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS PRESENTED WITH SAID MOTION.

CLYDE S. BAILEY,
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Counsel for said Association.

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Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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MOTION OF THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE.

The National Association of Railroad and Utilities Commissioners respectfully represents to the court that it is a voluntary Association which includes in its membership the members of the regulatory commissions of the several States of the United States except the States of Delaware and New York. Said Association further represents that most of said commissions are vested with power to prescribe the accounts of public service corporations subject to their jurisdiction by administrative action, and that many of said commissions likewise are vested with power to pre-

scribe the depreciation charges of such public service companies, to be observed in the keeping of accounts and the making of reports required by State law for State purposes.

Said Association further represents that, by reason of the facts aforesaid, said regulatory commissions, and said Association, as an agency of the same, have an interest in this case; and that said Association desires to file a brief herein, in support of the validity of the order of the State Railway Commission of Nebraska, the enforcement of which is sought to be enjoined.

Wherefore said Association respectfully moves this honorable court that it be granted leave to file a brief herein as *amicus curiae*.

CLYDE S. BAILEY,
JOHN E. BENTON,
Counsel for said Association.

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NORTHWESTERN BELL TELEPHONE COMPANY, *Appellants*,

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NEBRASKA STATE RAILWAY COMMISSION, *Appellee*.

BRIEF OF THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS AMICUS CURIAE.

PRELIMINARY STATEMENT.

This brief is filed on behalf of the National Association of Railroad and Utilities Commissioners, appearing by leave of court as *amicus curiae*. Said Association embraces within its membership the members of the railroad commissions, public service commissions and other regulatory commissions and boards of the several States of the United States, except the States of Delaware and New York. Its interest in this case, on behalf of the State commissions and boards represented in its membership, hereafter referred to collectively as State commissions, is to avoid the destruction of the jurisdiction of such commissions over the accounts and accounting practices of telephone companies which might result from a judgment of this court sustaining the contentions of the appellant.

STATEMENT OF THE CASE.

Reference is made to the statement of the case contained in the brief of the appellee, and that statement is adopted for the purposes of this brief.

SUMMARY OF ARGUMENT.

(1). Reports of public service companies to state governments, and accounts prescribed by state law to enable such reports to be made, are means and instrumentalities of state government not subject to destruction by Congress.

(2). The jurisdiction of the Nebraska Commission has not been destroyed or suspended by any exercise of paramount federal authority.

(a). The Power to Prescribe Depreciation Charges of Telephone Companies Originally Granted to the Interstate Commerce Commission and now vested in the Federal Communications Commission has Never Been Exercised, and State Jurisdiction over such Charges Continues Unaffected.

(b). The Difficulty of Determining Proper Depreciation Charges, Which Led the Interstate Commerce Commission to Undertake Substitute Short-Cut Methods.

(c). To Expedite the Beginning of Federal Depreciation Accounting the Interstate Commerce Commission Adopted Short-Cut Methods in Temporary Substitution for Compliance with the Statute.

(d). The First Short-Cut Method Planned by the Commission.

(e). The Second Short-Cut Method Adopted by the Commission, Under Which Action was Taken which is Relied Upon by the Appellant.

(f). The Interstate Commerce Commission Could Not Delegate Power to the Telephone Companies to Prescribe Their Own Depreciation Rates and Thereby Exempt Such Companies from the Regulation of the States.

(g). The contention Now Presented by the Appellant Was Overruled in the Illinois Bell Telephone Case.

(h). The Requirement of the Order That the Plaintiff Should Keep Accounts Showing Depreciation at the Prescribed Rate Upon All of Its Depreciable Property in Nebraska Did Not Exceed the Jurisdiction of the Nebraska Commission.

(i). The Appellant Apparently Recognizes That No Valid Action Was Taken Under the Grant of Power to the Interstate Commerce Commission to Prescribe Depreciation Rates.

(j). There is no conflict between the Nebraska Order and the Uniform System of Accounts for Telephone Companies Prescribed by the Interstate Commerce Commission, and now in effect.

(3). The order of the Nebraska Commission was legislative in character and, in the absence of requirement therefor in the Nebraska law, no hearing was necessary preliminary to the making of the same.

ARGUMENT.

(1). Reports of public service companies to state governments, and accounts prescribed by state law to enable such reports to be made, are means and instrumentalities of state government not subject to destruction by Congress.

The appellant contends that the Nebraska Commission was without jurisdiction to make the order here involved because Section 20(5) of the Interstate Commerce Act, which applied to telephone companies when the Nebraska order was made, grants to the Interstate Commerce Commission power to prescribe accounts and depreciation charges for carriers subject to the Act, and further makes it "unlawful for such carriers to keep any other accounts, records or memoranda than those prescribed or approved by the Commission."*

*See footnote on page 36 of this brief for text of Section 20(5).

In support of its contention that the Nebraska Commission was without jurisdiction to make the order involved in this proceeding, the appellant relies upon *Interstate Commerce Commission* v. *Goodrich Transit Company,* (228 U. S. 194) in which case this court sustained an order of the Interstate Commerce Commission requiring an interstate carrier to keep accounts covering all of the business of the carrier, including that which was intrastate.

The case just referred to, however, falls far short of sustaining the contention that Congress may directly, or through a regulatory agency created by it, disable a State government from requiring companies engaged in intrastate commerce within such State to keep such accounts, and to render such reports thereon, as are necessary for the governmental purposes of the State.

Accounts are required to be kept, and reports based thereon to be made, by public utilities to serve the purposes of government,—to acquaint regulatory commissions with the extent of the property of companies subject to their jurisdiction, and to give such commissions dependable information as to the operating revenues and the operating expenses of such companies; and also for the information of taxing officials; and for the information of those officials who control the issues of corporate securities and administer the laws which regulate the sale of such securities.

If a State is prevented from prescribing accounts which will supply the information which these officials need, it is crippled or prevented from performing the functions of government.

No such results follow from the application of the now familiar rule which permits the Federal government to establish the level of intrastate railroad rates when found to be necessary for the protection of interstate commerce.

In the case of such application the rights of individuals are affected, but the means are not denied the State whereby it is enabled to levy proper taxes for its maintenance, to

establish proper regulations for the government of public utilities in their services and charges, and otherwise to protect the interests of citizens of the State.

The same principle should apply with relation to State prescribed accounts and reports, necessary for the use of State governments, which prevents the Federal government from taxing the bonds of States and municipalities, or the income therefrom, *Pollock* v. *Farmers' Loan and Trust Company*, 157 U. S. 427, 586; or from taxing the salary of a State official, *Buffington* v. *Day*, 78 U. S. 113.

In *Buffington* v. *Day*, just cited, the general rule was expressed by this court as follows:

> "The General Government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former, in its appropriate sphere, is supreme: but the States within the limits of their powers not granted, or, in the language of the 10th Amendment, 'reserved,' are as independent of the General Government as that government within its sphere is independent of the States. * * * Such being the separate and independent condition of the States in our complex system, as recognized by the Constitution, and the existence of which is so indispensable, that, without them, the General Government itself would disappear from the family of nations, it would seem to follow, as a reasonable, if not a necessary consequence, that the means and instrumentalities employed for carrying on the operation of their governments for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired; should not be liable to be crippled, much less defeated by the taxing power of another government, which power acknowledges no limits but the will of the legislative body imposing the tax. * * * It is admitted that there is no express provision in the Constitution that prohibits the General Government from taxing the means and instrumentalities of the States, nor is

there any prohibiting the States from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government." (78 U. S. 113)

In *Ambrosini* v. *United States,* 187 U. S. 1, the principle was applied to bonds required by the law of Illinois to be given by licensees as prerequisites to the issuance of liquor licenses. It was held that its bonds were instrumentalities of the State government and not subject to the requirements of the Federal revenue law. In its opinion the court said:

"The act and the ordinance required these bonds to be given as prerequisites to the issue of licenses permitting the sale. * * * The granting of the licenses was the exercise of a strictly governmental function, and the giving of the bonds was part of the same transaction. To tax the license would be to impair the efficiency of state and municipal action on the subject and assumes the power to suppress such action. And considering license and bond together, taxation of the bond involves the same consequences. In themselves the bonds were not mere incidents of the regulation of the traffic, but essential safeguards against its evils, and governmental instrumentalities of state and of city, as authorized by the state, to insure the public welfare in the conducts of the business, although the business itself was not governmental. They were not mere individual undertakings to secure a personal privilege as suggested by the court below, but means for the preservation of the peace, the health, and the safety of the community in compelling strict observance of the law, and remedying injurious results.

"The general principle is that, as the means and instrumentalities employed by the general government to carry into operation the powers granted to it are exempt from taxation by the states, so are those of the

> states exempt from taxation by the general government. It rests on the law of self-preservation, for any government whose means employed in conducting its strictly governmental operations are subject to the control of another and distinct government exists only at the mercy of the latter." (187 U. S. 1, 6.)

We point out that the keeping of accounts prescribed by State law, and the making of reports based thereon to State governments in no way impede the procurement by the Federal government of whatever information it may require for its own governmental purposes. If the requirements of the two governments differ, such difference may cause additional expense to regulated utilities, but so does the keeping of any system of accounts prescribed by government, which requires the compiling of information additional to that which is necessary for the purposes of the accounting company.

The Federal Power Act explicitly preserves the right of State governments to require accounts different from those prescribed by the Federal Power Commission. Section 301(a), which empowers the Federal Power Commission to prescribe accounts, contains the following proviso:

> "*Provided, however,* That nothing in this Act shall relieve any public utility from keeping any accounts, memoranda, or records which such public utility may be required to keep by or under authority of the laws of any State."

In this connection we point out that while the Communications Act of 1934 contains, in Section 220, provisions similar to those of the Interstate Commerce Act, upon which the appellant relies, paragraph (j) of said Act recognizes that the powers of State commissions with respect to accounting have not been terminated. That paragraph is as follows:

> "(j) The Commission shall investigate and report to Congress as to the need for legislation to define fur-

ther or harmonize the powers of the Commission and of State commissions with respect to matters to which this section relates."

Paragraph (l) of the same Section also provides:

"(i) The Commission, before prescribing any requirements as to accounts, records or memoranda, shall notify each State commission having jurisdiction with respect to any carrier involved, and shall give reasonable opportunity to each such commission to present its views, and shall receive and consider such views and recommendations."*

*That the cooperation provided for in this paragraph of the statute may be expected to operate to prevent the imposition of diverse accounting requirements is indicated by the experience thus far thereunder, reflected in a resolution adopted by the National Association of Railroad and Utilities Commissioners. This resolution is set forth in the published proceedings of said Association, as follows:

WHEREAS, The Interstate Commerce Commission, while vested with jurisdiction over the accounts of telephone companies engaged in interstate commerce, prescribed a system of accounts for telephone companies, which system was also prescribed or approved for use in various States as the basis for reports to the respective State regulatory commissions; and

WHEREAS, Said Interstate Commerce Commission thereafter prescribed a revised system of accounts for telephone companies, based upon the aforesaid system, to be known as "Uniform System of Accounts for Telephone Companies," which system became effective January 1, 1933; and

WHEREAS, Various State regulatory commissions prior to the taking effect of the said uniform system of accounts protested against various provisions contained therein and requested amendment of the same; and

WHEREAS, After a hearing upon said protests following the enactment of the Communications Commission Act of 1934, but before the same took effect, the Interstate Commerce Commission in its docket No. 25705 filed a report dealing with said protests; and

WHEREAS, Following the organization of the Federal Communications Commission, said Commission, by order No. 7 of its Telephone Division, provided that the State regulatory commissions and other interested parties should have until October 1, 1934, to file exceptions and objections to said report of the Interstate Commerce Commission, which time upon request of representatives of this Association was later extended until November 1, 1934; and

WHEREAS, Exceptions and objections were prepared by the accounting representatives of various State regulatory commissions, working together, which were distributed to all the commissions of the States represented in this Association, and were generally approved and filed on behalf of State regulatory commissions represented in this Association; and

WHEREAS, Said exceptions and objections were also considered by a conference of representatives of the various State commissions held at Washington, D. C., on the day preceding the 1934 convention of this Association and were approved by said conference; and

WHEREAS, At a hearing thereafter held before the Telephone Division of said Federal Communications Commission, said exceptions and objections were sup-

In view of the grave constitutional question which will be presented, if the language of Section 20(5) forbidding the keeping of other accounts than those prescribed by the Interstate Commerce Commission (now found also in the Communications Act, Section 220(g)) is to be construed as prohibiting companies from conforming to state laws, respecting accounts, the same should be construed as designed only to apply to accounting requirements to be kept as a basis for reports to be made to a Federal Commission, and not as intended to prevent compliance with State laws.

However, we believe that the Court will not find it necessary to determine whether Congress has the constitutional power to prevent public utilities from complying with State laws as respect accounts and reports necessary for State governmental purposes, nor the scope of the jurisdiction respecting accounts, which Congress undertook to vest in

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ported by the General Solicitor of this Association under instructions from the commissions of forty-two States; and

WHEREAS, Following said hearing the Federal Communications Commission, through its Telephone Division, called a conference of representations of State commissions and of telephone utilities for discussion and consideration of the provisions to be contained in said proposed Uniform System of Accounts, at which conference the State commissions were represented by officers of this Association and by the accountants who had prepared said exceptions and objections; and

WHEREAS, Said exceptions and objections were thereupon fully considered and the Uniform System of Accounts for Telephone Companies theretofore promulgated by the Interstate Commerce Commission was thereupon amended and revised; and

WHEREAS, The accounting representatives of the State commissions represented in this Association participating in said conference concurred in such amendments and revision; and

WHEREAS, Said revised Uniform System of Accounts has since been promulgated by the Federal Communications Commission through its Telephone Division by its order dated June 19, 1935, to be known and designated as "Uniform System of Accounts for Telephone Companies, issue of June 19, 1935, effective January 1, 1936"; and

WHEREAS, It is highly desirable that accounting regulations proscribed for the use of companies subject to the jurisdiction of both Federal and State authorities shall be prepared in cooperative conferences and shall be prescribed by both Federal and State authorities whenever that shall be possible, so that conflicting and diverse requirements may be avoided; Therefore be it

RESOLVED, That this Association recommends to the several State commissions represented in this Association, which exercise jurisdiction over the accounts of telephone companies that they respectively adopt and prescribe for State application the aforesaid Uniform System of Accounts for Telephone Companies, prescribed as aforesaid by Federal Communications Commission. (Proceedings, 47th Annual Convention, National Association of Railroad and Utilities Commissioners, Page 480-483)

the Interstate Commerce Commission by said Section 20(5). We believe that the Court will not come to these questions, because it will find that the order here involved is in no way in conflict with any regulation imposed by Congress or by its authority. It is to this proposition that the remainder of our argument upon the question of jurisdiction will be directed.

(2). The jurisdiction of the Nebraska Commission has not been destroyed or suspended by any exercise of paramount federal authority.

The Power to Prescribe Depreciation Charges of Telephone Companies Originally Granted to the Interstate Commerce Commission and Now Vested in the Federal Communications Commission Has Never Been Exercised, and State Jurisdiction Over Such Charges Continues Unaffected.

The statutory provisions upon which the appellant relies are found in Section 20 of the Interstate Commerce Act, which provides as follows:

> "Sec. 20. (1) That the Commission is hereby authorized to require annual reports from all common carriers subject to the provisions of this Act, * * * and the Commission may, in its discretion, for the purposes of enabling it the better to carry out the purposes of this Act, prescribe a period of time within which all common carriers subject to the provisions of this Act shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept. * * *
>
> "(5) The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of this Act, including the accounts, records, and memoranda of the movement of traffic, as well as of the receipts and expenditures of moneys. The Commission shall, as soon as practicable, prescribe, for carriers subject to this Act, the classes of property for

which depreciation charges may properly be included under operating expenses, and the percentages of depreciation which shall be charged with respect to each of such classes of property, classifying the carriers as it may deem proper for this purpose. The Commission may, when it deems necessary, modify the classes and percentages so prescribed. The carriers subject to this Act shall not charge to operating expenses any depreciation charges on classes of property other than those prescribed by the Commission, or charge with respect to any class of property a percentage of depreciation other than that prescribed therefor by the Commission. No such carrier shall in any case include in any form under its operating or other expenses any depreciation or other charge or expenditure included elsewhere as a depreciation charge or otherwise under its operating or other expenses. * * * and it shall be unlawful for such carriers to keep any other accounts, records, or memoranda than those prescribed or approved by the Commission. * * *"

The direction by Congress was that *the Commission itself* should prescribe "as soon as practicable" depreciation rates for the several classes of depreciable property of the companies subject to its jurisdiction; and the statute also provided that, when the Commission should have obeyed the mandate of the statute, the companies affected were required to charge to operating expenses amounts for depreciation conforming to the Commission's order. Until the Commission should establish depreciation rates found proper by it, however, we maintain that the intent of the statute was that the companies subject to the Commission's jurisdiction, should continue free from Federal control in the matter of depreciation accounting. The only restrictions provided in the statute are that no carrier, subject to the Act, shall charge to operating expense "any depreciation charges on classes of property other than those prescribed by the Commission, or charge with respect to any class of property a percentage of depreciation other than that prescribed therefor by the Commission," and that no such

company shall "include in any sum under its operating or other expenses" any amount which is elsewhere carried as a depreciation charge.

These provisions as to depreciation were enacted in 1920. It can not be supposed that the Congress was ignorant of the difficulties which would confront the Commission in the performance of the duties imposed upon it. It was recognized that a considerable time would be required before the Commission could act. The Congress accordingly directed the Commission to prescribe depreciation rates, not immediately, but "as soon as practicable."

It can not be supposed that it was the intent of Congress that no depreciation charges whatever should be made by carriers pending the time when the Commission should be prepared to act. Neither can it be supposed that it was the intention of Congress, even if it had the power, to leave companies engaged both in interstate commerce and in intrastate commerce altogether free from regulation by the States during the years which might intervene between the enactment of the statute and the prescription of depreciation rates by the Federal Commission.

It must accordingly have been the intent of Congress that the orders of the Commission should become effective when made; and that until the promulgation of such orders, the companies to which they were to apply should be left unaffected by the statute. If the statute be so construed, no question of conflict between Federal and State requirements can arise pending action by the Federal commission in conformity with the Congressional direction.

The importance of the point here involved is obvious. The appellant's construction of the statute, if constitutional, would result in the removal of all regulation of depreciation charges for an indefinite time. Our construction would leave State regulation unaffected, at least until the Federal Commission should exercise the power conferred upon it.

The provisions of Section 20(5) of the Interstate Commerce Act were enacted in 1920, as a part of the Transportation Act.

The order of the Interstate Commerce Commission in No. 14,700 *Depreciation Charges of Telephone Companies*, I. C. C. No. 14,700, 177 I. C. C. 351, did not prescribe telephone depreciation rates, and did not purport to do so. It merely called upon the Telephone companies to submit estimated rates of depreciation upon certain classes of property, specified by the Commission, to the State commissions on or before September 1, 1932, together with sworn statements as to the bases and methods used in the preparation of such estimates. This order was made on July 28, 1931. By subsequent orders the effective date of that order was twice postponed by the Interstate Commerce Commission. The last order of that Commission provided that the data required to be filed with the State commissions should be so filed on August 1, 1934 and that the depreciation accounting contemplated by the order should begin on January 1, 1935. We will later in this brief discuss the plan and purpose of this order—we now proceed to point out that, in so far as it related to the institution of depreciation accounting, it never took effect.

After the organization of the Federal Communications Commission, that Commission made the following orders respecting said order of the Interstate Commerce Commission of July 28, 1931, in said No. 14,700—

FEDERAL COMMUNICATIONS COMMISSION
Telephone Division

Order No. 10-A
Docket No. 2552

December 13, 1934.

Commissioners Walker, Chairman, Case and Sykes:

In a regular meeting of the Telephone Division of the Federal Communications Commission, December 13, 1934:

The Telephone Division having under consideration the orders and memoranda heretofore issued by the Interstate Commerce Commission in its Docket No. 14,700, Depreciation Charges of Telephone Companies, effective January 1, 1935, and the hearing and argument thereon:

IT IS ORDERED, That said orders of the Interstate Commerce Commission be, and they are hereby amended as follows:

(a) By changing the effective date of said order of July 28, 1931, applicable to Class A telephone companies, from January 1, 1935, to January 1, 1936.

(b) By extending to May 1, 1935, the time within which the State Commissions, if they so desire, may submit original recommendations to this Commission for its consideration in issuing any orders specifying the composite annual percentage rates to be used by Class A telephone companies.

Provided, That the estimates of composite percentage rates submitted by telephone companies to the State Commissions and to this Commission are for the information of the several Commissions, but shall not be deemed to be prima facie correct.

Provided further, That nothing in the foregoing shall be construed as relieving telephone companies from accounting for depreciation by the application to the primary plant account of composite annual percentage rates based upon the best estimates available of service lives and salvage values, as required by the Uniform System of Accounts for Telephone Companies, (First Revised Issue, 1933), unless and until further ordered by this Commission in accordance with the foregoing order.

By the Commission, Telephone Division.

HERBERT L. PETTEY,
Secretary.

(Seal)

FEDERAL COMMUNICATIONS COMMISSION
Telephone Division

Order No. 10-B
Docket No. 2552

Commissioners Walker, Chairman, Brown and Case:

At a regular meeting of the Telephone Division of the Federal Communications Commission, May 1, 1935:

The Telephone Division, having under consideration the records and orders in Interstate Commerce Commission Docket No. 14,700, Depreciation Charges of Telephone Companies, and Federal Communications Commission Docket No. 2552, Depreciation Charges of Telephone Companies:

It is Ordered, That the effective dates of the orders heretofore prescribed by the Interstate Commerce Commission and the Federal Communications Commission in these proceedings be, and they are hereby, indefinitely postponed.

By the Commission, Telephone Division.

HERBERT L. PETTEY,
(Seal) Secretary.

It thus appears that if the effect of the provisions of Section 20(5) of the Interstate Commerce Act, enacted in 1920, was to exclude State regulation of depreciation accounting, the result has been to leave telephone companies free from public regulation of their depreciation charges for a period of more than 15 years already passed, and until some time in the indefinite future when the Communications Commission may be prepared to prescribe depreciation rates.

The Difficulty of Determining Proper Depreciation Charges, Which Led the Interstate Commerce Commission to Undertake Substitute Short-Cut Methods.

The explanation of this long delay by the Federal regulatory commissions in carrying out the directions of Congress is undoubtedly to be found in the difficulty of the task imposed by the statute. In a report in said *Depreciation*

Charges of Telephone Companies, I. C. C. 14,700, made on November 2, 1926, the Interstate Commerce Commission said:

> "All parties to this proceeding concede that uniform rates of depreciation can not be established for all telephone companies. *There is entire agreement that rates of depreciation for the same classes of property differ materially, dependent upon the conditions under which the particular company operates, and that if we are to prescribe rates of depreciation, as the statute contemplates, a careful study must be made of the situation of each individual company.* Nor, so far as we are aware, has any exception been taken to the assertion of the committee representing the National Association of Railway and Utilities Commissioners that the great bulk of telephone business consists of intrastate local community service; that the interstate service is largely toll service; and that it constitutes an insignificant fraction of the total business. These being the facts, and disregarding for the moment the proper interpretation of the law we are called upon to administer, it is obvious that *the determination of rates of depreciation for the various classes of telephone property is a task which could more appropriately, conveniently, and economically be carried on by the State commissions than by us.* It becomes necessary to consider, however, whether under the law as it now stands it is legally possible to leave this task wholly to the State commissions. * * * (Italics ours)
>
> "So far as the class D telephone companies are concerned it may be conceded that the prescription of depreciation requirements by us is impracticable, for the same reasons that we have refrained from requiring such companies to conform to our uniform system of accounts. So far as the companies in classes A, B and C are concerned, however, we are unable to conclude that the prescription of depreciation requirements by us, although involving much time and expense, is *impracticable.* Unless and until the provisions of paragraph (5) of section 20 are changed by Congress, therefore, we feel that we must endeavor to enforce them in the case of such companies. * * *" (118 I. C. C. 295, 332, 333)

The years of delay which have followed the conclusion thus announced bear additional testimony to the difficulty of the enormous task which the Commission felt imposed upon it by the law.

In determining whether Congress could have intended that telephone companies should be set free from State regulation of their depreciation charges during the investigation which would be necessary, before the Federal commission could prescribe such charges, regard must be had not only to the length of time which such investigation necessarily would involve, but also to the fact, recited by the Interstate Commerce Commission in the language just quoted, that "the great bulk of telephone business consists of intrastate local community service" and that interstate service "constitutes an insignificant fraction of the total business."

The necessity for public regulation of depreciation charges was demonstrated by the decision of this court in *Lindheimer* v. *Illinois Bell Telephone Company*, 292 U. S. 150, in which case it appeared that the telephone utility involved in that case, over a long term of years, had been charging to operating expense, for depreciation, amounts greatly in excess of the amounts necessary to cover depreciation actually accrued. In that case the court very clearly stated what should be aimed at in the making of depreciation charges, and the misuse to which such charges may be put, as follows:

> "Broadly speaking, depreciation is the loss, not restored by current maintenance, which is due to all the factors causing the ultimate retirement of the property. * * * According to the practice of the Company, the depreciation reserve is not held as a separate fund but is invested in plant and equipment. As the allowances for depreciation, credited to the depreciation reserve account, are charged to operating expenses, the depreciation reserve invested in the property thus represents, at a given time the amount of the investment which has been made out of the proceeds of telephone rates for the ostensible purpose of replacing capital

consumed. If the predictions of service life were entirely accurate and retirements were made when and as these predictions were precisely fulfilled, the depreciation reserve would represent the consumption of capital on a cost basis, according to the method which spreads that loss over the respective service periods. But if the amounts charged to operating expenses and credited to the account for depreciation reserve are excessive, to that extent subscribers for the telephone service are required to provide in effect capital contributions, not to make good losses incurred by the utility in the service rendered and thus to keep its investment unimpaired, but to secure additional plant and equipment upon which the utility expects a return." (292 U. S. 167, 168, 169)

In the case now before this Court it appeared at the hearing before the Nebraska Commission, before the order involved in this case was made, that the appellant had accumulated depreciation reserves of 25.99 per cent whereas, according to the appellant's own estimate its telephone properties were in 88 per cent condition (Exhibits 3, Rec. 191, and Exhibit 4, Rec. 196).

The Congress must have had knowledge of these practices of telephone companies. The enactment of Section 20(5) shows that it recognized the danger of the misuse of depreciation charges. It is not to be lightly supposed that it intended to destroy the power of State regulation, at least without providing forthwith a substitute.

To Expedite the Beginning of Federal Depreciation Accounting the Interstate Commerce Commission Adopted Short-Cut Methods in Temporary Substitution for Compliance with the Statute.

The Interstate Commerce Commission never either determined or promulgated rates of depreciation to be observed by telephone companies. It did, however, take action hereinbefore referred to, under which it intended that telephone utilities should begin to make depreciation charges prior

to determination by the Interstate Commerce Commission of the propriety of such charges, leaving such determination to be made thereafter in individual cases, as complaints presented to the Commission should compel, and as the Commission might find itself able to reach conclusions. In order to discuss clearly the present case, it is necessary to review the action of the Interstate Commerce Commission in this matter.

Recognizing the difficulty of the task with which it was confronted, and the great length of time which would be required properly to determine depreciation rates to be prescribed for the great number of utilities subject to its jurisdiction, the Interstate Commerce Commission undertook to bridge the gap by two short cut methods, one of which it never followed to the contemplated end, and the other of which resulted in the order here relied upon by the appellant. This latter short cut was wholly without warrant of law, as we shall point out when we come to a discussion of the same.

The Commission took these two separate actions at different times. The first never resulted in the promulgation of any order or orders prescribing depreciation rates, but was preparatory thereto. The second was the inclusion in the Uniform System of Accounts for Telephone Companies of certain instructions concerning depreciation. Those instructions are what the appellant especially relies upon in this case. These two short cuts will be now discussed.

The First Short-Cut Method Planned by the Commission.

In its first report *In Depreciation Charges of Telephone Companies,* 118 I. C. C. 295, in 1926, from which quotation has already been made, the Commission stated the difficulty of the situation with which it was faced, and the course which it then proposed to pursue as follows:

> "Upon one proposition all parties are agreed, and that is that the service lives of the same kind of prop-

erty vary widely in different companies. It is impossible to lay down any general rule which will apply in the case of all companies or even in the case of a particular class of companies, owing to the different conditions which surround the use of the property in each individual case. Our depreciation section, in the case of both steam railroad companies and telephone companies, recommended that the yearly percentages of depreciation (which are dependent wholly upon prospective service lives) should be ascertained in the first instance by a formula. In the case of telephone companies this formula was as follows:

'After the service life of each class of property has been estimated, ascertain by classes of property the total amount of actual retirements and the total amount of salvage for a period immediately preceding the effective date of these regulations which shall contain the same number of years as is embraced within the estimated service life of each class. Obtain therefrom the average amount of annual retirements and the average amount of annual salvage by classes.'

'The ratio which the average annual amount of retirements less the average annual amount of salvage, bears to the original or estimated cost of the class of property affected plus the cost of additions and betterments thereto, shall be the percentage of depreciation applicable to that class of property for the first year subsequent to the effective date of these regulations.' * * *

"In effect this formula is nothing more nor less than an attempt to base prospective service life for the future solely upon the experience of the past. This, it seems to us, constitutes its great defect. In the first place, it is doubtful whether many companies possess the records which would make possible the application of the formula, particularly in the case of classes of property having long service lives. In the second place, and this is a still more important consideration, it is by no means an inevitable conclusion that service lives in the future will be the same as they have been in the past. Not only do types of property change in con-

struction and character, but the conditions under which they are used change, often very radically. For example, it was pointed out in these proceedings that in recent years great progress has been achieved in the telephone industry and many improvements have been made which should result in longer service life for a great many of the items of property. There seems indeed, to be no way in which prospective service life for the future can safely be estimated through an automatic or mechanical process. The estimate must needs be made by combining the results of actual past experience with the best available engineering advice as to the probabilities of the future."

"Under such circumstances and in view of the great diversity of conditions existing among the various companies, the best that can be done is to require each company, in the first instance, to make an estimate of the prospective service lives of the various classes of property and consequent depreciation percentages for each of its primary accounts of depreciable property in the manner above prescribed, and submit the result, accompanied by a detailed exposition of the facts of record and the engineering advice upon which the estimate has been based. In some instances these percentages will, of course, be composites. In the case of steam railroads we already have an accumulated store of information gathered together in the course of the valuation work which will be of great assistance in passing upon the accuracy of these estimates. To avoid delay in inaugurating the new plan of accounting, it will doubtless be necessary for us, after such estimates and the acompanying expositions have been filed and following an office check, to prescribe percentages of depreciation for each primary account by a temporary order subject to later revision. * * *

"In the case of telephone companies we have already suggested, in an earlier part of this report, a modification of this plan which can be employed with advantage under the unusual circumstances existing. As we there pointed out, the great bulk of telephone business is of strictly local concern, and the State commissions are much better informed and equipped than we are to pass upon the conditions surrounding this local service.

Moreover the interstate commerce act now specifically authorizes us to avail ourselves of the 'cooperation, services, records, and facilities of such state authorities in the enforcement of any provisions of this act.' * * * In the present instance aid, from the State commissions, is not only desirable because of the essentially local character of most of the telephone service, but also because of the substantial relief which it will afford us in the burden of determining prospective service lives and depreciation percentages for the large number of telephone companies operating in this country.

"We are, therefore, of the opinion that in all cases where State commissions have authority intrastate over telephone companies, the prospective service lives and depreciation percentages estimated in the first instance by such companies, with the accompanying expositions of the reasons therefor, should be transmitted to the appropriate State commission or commissions instead of to this commission, and that our temporary order prescribing depreciation percentages should be based upon the recommendations of such commissions. Further proceedings, with a view to modifications of the temporary orders, would be conducted for us by the State commissions. Where more than one State commission has jurisdiction over a particular telephone company, cooperation between such commissions can no doubt be arranged. In the event, also that no State commission has jurisdiction or in the event that such State commission or commissions as have jurisdiction are unwilling to assist us in the manner indicated, it will be necessary to follow the same procedure as in the case of steam railroad companies." (118 I. C. C. 372, 373, 374)

This first short-cut method contemplated that the State commissions, within their respective States, should make studies of data submitted to them by the telephone companies, and should recommend to the Interstate Commerce Commission depreciation rates which that Commission would thereupon promulgate by "temporary orders", which temporary orders would thereafter be corrected as necessity therefor should appear, in hearings thereafter to be

held, either by the State commissions for the Interstate Commerce Commission or by that Commission itself.

This first report was reopened for further consideration. Another report in the same proceeding was made July 28, 1931. The Commission adhered to its plan of enlisting the aid of the State commissions, and of basing temporary depreciation orders upon their recommendations.

An accompanying order was made, already hereinbefore referred to, requiring telephone companies to file estimated depreciation rates with the State commissions not later than September 1, 1932. Depreciation accounting in accordance with the order was to begin on January 1, 1933. (Rec. p. 4.)

This plan for obtaining the help of the State commissions was consistent with the cooperative provisions of Section 13(3) of the Interstate Commerce Act, but the time which the order proposed to allow the State commissions for making their studies and recommendations would have prevented the success of the plan, if it had ever been attempted, as it never was. It gave just four months for the State commissions to begin and conclude their studies, to make their recommendations to the Interstate Commerce Commission, and for that Commission to promulgate orders putting the rates into effect.

By subsequent orders, however, the date before which companies were required to file estimates and data with the State commissions was postponed to August 1, 1934, and the date for beginning depreciation accounting to January 1, 1935. (Rec. 4)

The Second Short-Cut Method Adopted by the Commission, Under Which Action was Taken Which is Relied Upon by the Appellant.

While time was thus running on, the Interstate Commerce Commission changed its plan of procedure in a very important particular. The reason of the change does not appear

from the record, but presumably it was because of the Commission's anxiety to get depreciation accounting into effect, and because it had become evident that it would require years rather than months to procure recommendations from the State commissions, and to make the contemplated temporary orders thereon. Whatever the moving cause, the Commission adopted a new plan, which is that which we have referred to as wholly without warrant of law.

The new plan was this. The Commission was about to issue a Revised Uniform System of Accounts for Class A and B Telephone Companies. It determined to incorporate therein a depreciation order, under which Federal depreciation accounting should begin without awaiting any further order of the Commission.

The Commission promulgated its Revised Uniform System of Accounts accordingly. (Exhibit 7, Rec. 201.)

This required that the telephone utilities, subject to the order, should prepare estimated depreciation rates for their several classes of depreciable property designated by the Commission, and should deliver such estimates to the State commissions accompanied by sworn statements showing the bases therefor, and the methods employed in their computation. Such estimates were to be prepared in the manner directed in Instruction 80, contained in said Uniform System. Instruction 81 of said system provided in part as follows:

> "81. Depreciation charges.—(A) Charges for currently accruing depreciation shall be made monthly to account 608, 'Depreciation,' and account 702, 'Vehicle and other work equipment expense,' as appropriate, and corresponding credits shall be made to account 171, 'Depreciation reserve.' In computing the current monthly charges, one-twelfth of the composite annual percentage rate applicable to the primary accounts covering depreciable telephone plants shall be applied to the average of the balances, as of the first and last of the current month, in each such primary account.
>
> "(C) A separate composite annual percentage rate for each account covering depreciable telephone plant

shall be used in computing depreciation charges. Such composite rates shall be those which are from time to time prescribed by this Commission, *except that where no rates previously have been prescribed for the company's use by this Commission, the company's estimates of composite annual percentage rates computed in accordance with instruction 80 shall be used prior to the date rates prescribe by this Commission become effective.*" (Rec. 212.) (Italics ours)

By this "instruction", contained in the Uniform System of Accounts promulgated November 12, 1932, the Interstate Commerce Commission thus undertook to establish depreciation accounting *not by prescribing depreciation rates, as it was by the statute directed to do, but by ordering the carriers to estimate their own depreciation rates and to use such estimates until the Commission should finally, if ever, prescribe rates found by it to be proper.*

The Interstate Commerce Commission Could Not Delegate Power to the Telephone Companies to Prescribe Their Own Depreciation Rates and Thereby Exempt Such Companies From the Regulation of the State.

Our contention is that this order of the Commission, in so far as it related to depreciation rates, was in no sense a compliance with the statutory mandate, and that it was wholly without warrant of law. In effect, it represented an attempt on the part of the Commission to delegate its own power to the Telephone companies, and to impart to such depreciation rates as the companies might adopt the same character and effect as if they had been prescribed by the Commission.

This was beyond the power of the Commission.

This court has clearly held, in a series of decisions, that the authority of the States may not be displaced under a Federal statute except by procedure in strict conformity with such statute, and the fact of such conformity must clearly appear.

In *Illinois Central Railroad* v. *Public Utilities Commission,* 245 U. S. 492, the court said:

> "In construing Federal statutes enacted under the power conferred by the commerce clause of the Constitution the rule is that it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a state, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested. * * * This being true of an act of Congress, it is obvious that an order of a subordinate agency, such as the Commission, should not be given precedence over a state rate statute otherwise valid, unless and except so far as, it conforms to a high standard of certainty." (245 U. S. 510.)

In *Board of Railroad Commissioners* v. *Great Northern Railway,* 281 U. S. 412, dissolving an injunction which had been granted by the District Court restraining the enforcement of intrastate rates upon the ground that they operated as an undue discrimination against interstate commerce, such discrimination not having been found by the Interstate Commerce Commission, this court said:

> "It is said that the interlocutory injunction, granted below, was in aid of the proceedings pending before the Interstate Commerce Commission. But the injunction necessarily has the effect of preventing the state from enforcing the rates it has prescribed, which are lawful rates until the Interstate Commerce Commission finds that they cause an unjust discrimination against interstate commerce. A judicial restraint of the enforcement of intrastate rates, although limited to the pendency of proceedings before the Interstate Commerce Commission, is none the less essentially a restraint upon the power of the state to establish rates for its internal commerce, a power the exercise of which in prescribing rates otherwise valid is not subject to interference upon the sole ground of injury to interstate commerce, save as Congress has validly provided. Congress has so provided only in the event that, after full hearing in which the state authorities may partici-

pate, the Interstate Commerce Commission finds that unjust discrimination is created." (281 U. S. 430)

The Contention Now Presented by the Appellant Was Overruled in the Illinois Bell Telephone Case.

In *Smith* v. *Illinois Bell Telephone Company,* 282 U. S. 133, exactly the same argument was made as is presented here by the appellant. This court in that case said:

> "The company urges that, as Congress has granted jurisdiction to the Interstate Commerce Commission over the depreciation rates of telephone companies doing an interstate business (Interstate Commerce Act, Sec. 20(5), as amended by Transportation Act, February 28, 1920, U. S. C. title 49, Sec. 20) this subject is now completely withdrawn from the power of the state. It is said that two rates of depreciation cannot be charged on the same property. The Interstate Commerce Commission has had the matter under consideration (Re Telephone & R. Depreciation Charges, 118 Inters. Com. Rep. 328-333) but so far as we are advised a final determination has not yet been made. The Interstate Commerce Commission has its accounting rules with reference to depreciation charges and, pending its order under Sec. 20(5) of the Interstate Commerce Act, telephone companies, as well as others subject to the act, have been directed to continue to observe these requirements. The company argues that, although the Interstate Commerce Commission has not finally ruled, the action taken by Congress excludes the jurisdiction of state tribunals under familiar principles. *Northern P. R. Co.* v. *Washington,* 222 U. S. 370, 378, 56 L. ed. 237, 239, 32 S. Ct. 160; *Pennsylvania R. Co.* v. *Public Service Commission,* 250 U. S. 566, 569, 63 L. ed. 1142, 1145, P. U. R. 1920A, 909, 40 S. Ct. 36; *Oregon-Washington R. & Nav. Co.* v. *Washington,* 270 U. S. 87, 102, 70 L. ed. 482, 488, 46 S. Ct. 279. We are unable to assent to this view. As the Interstate Commerce Commission has not acted finally in the matter, we are not now called upon to consider the scope of its authority in relation to depreciation charges, but we are of the opinion that, in any event until action has been taken which

could be deemed validly to affect the amount to be charged to depreciation in connection with intrastate business so as to affect intrastate rates, the prerogative of the state to prescribe such rates, and the jurisdiction and duty of the statutory court in considering their validity to determine the amount properly allowable for depreciation in connection with the intrastate business, are not to be gainsaid. Compare *Railroad Comrs.* v. *Great Northern R. Co.*, 281 U. S. 412, 74 L. ed. 936, 50 S. Ct. 391." (282 U. S. 133, 159)

No order prescribing depreciation rates has yet been made either by the Interstate Commerce Commission or by the Federal Communications Commission, and hence the court is not called upon to consider the scope of its authority when the Commission shall have acted. Pending such action the States are not disabled to make such requirements for State accounting as they may deem in the public interest. *Missouri Pacific Railway Co.* v. *Larabee Flour Mills Co.*, 211 U. S. 612, 623. In the cited case the court held that the mere grant by Congress to the Commission of certain national powers in respect to interstate commerce, does not of itself, and in the absence of action by the Commission, interfere with the authority of the State to make these regulations conducive to the welfare and convenience of its citizens.

The Requirement of the Order That the Plaintiff Should Keep Accounts Showing Depreciation at the Prescribed Rate Upon All of Its Depreciable Property in Nebraska Did Not Exceed the Jurisdiction of the Nebraska Commission.

The plaintiff lays stress upon the requirement of the order that the prescribed composite depreciation rate should be applied for all the plaintiff's depreciable property in Nebraska. This, however, is no ground of invalidity.

The order looks merely towards placing upon the books of the plaintiff certain information which shall be available to the defendant Commission, to the tax officials, and other

officials of the State and to the public. It places no obligation upon the plaintiff with respect to the use of the property covered, and is in no sense a regulation of such use. The reverse of this question was before this court in *Interstate Commerce Commission* v. *Goodrich Transit Company*, 224 U. S. 194. That case involved the right of the Interstate Commerce Commission to require the keeping of accounts concerning purely intrastate business. The Commission's order was sustained. The court said:

> "If the Commission is to successfully perform its duties in respect to reasonable rates, undue discriminations and favoritism, it must be informed as to the business of the carriers by a system of accounting which will not permit the possible concealment of forbidden practices in accounts which it is not permitted to see and concerning which it can require no information. It is a mistake to suppose that the requiring of information concerning the business methods of such corporations, as shown in their accounts, is a regulation of business not within the jurisdiction of the Commission, as seems to be argued for the complainants. The object of requiring such accounts to be kept in a uniform way and to be open to the inspection of the Commission is not to enable it to regulate the affairs of the corporations not within its jurisdiction, but to be informed concerning the business methods of the corporations subject to the act that it may properly regulate such matters as are really within its jurisdiction. Further, the requiring of information concerning a business is not regulation of that business." (224 U. S. 194, 211)

This case established the right of the Federal Commission to impose accounting requirements with respect to property, the operation of which it had no power to regulate. In the same way, the Nebraska Commission having been vested with jurisdiction over the intrastate business of the appellant, has a right to demand information concerning the expense of operation of all its business in Nebraska, both interstate and intrastate.

The Appellant Apparently Recognizes that no Valid Action was Taken Under the Grant of Power of the Interstate Commerce Commission to Prescribe Depreciation Charges.

In appellant's brief at page 39, it is said:

> "It is not the nature of the subject matter or facts that are to be recorded upon the books which is characteristic of the exercise of federal authority. Jurisdiction of accounting does not here depend upon jurisdiction to regulate the transactions which are being accounted for. Hence it is that the argument here made does not look for any essential foundation to the amendment of Section 20, Paragraph (5) of the Interstate Commerce Act by the Transportation Act of 1920, which directed the Interstate Commerce Commission to determine the classes of property for which depreciation should be charged as an expense, and to fix the rates of depreciation to be charged with respect to each class.

The appellant thus apparently recognizes that the Interstate Commerce Commission has not taken valid action under the power to prescribe depreciation rates, which was vested in it in 1920, and therefore attempts to treat the power to prescribe *the rate* of depreciation as a part of the power to prescribe *the form* of depreciation. The two things, however, are quite distinct.

The extent of depreciation is of course a fact which can not be altered by any record which is made concerning it. It is a fact which can not be known otherwise than by estimate. Therefore depreciation accounting is nothing more nor less than the recording of estimated depreciation.

The making of estimates of depreciation is not accounting. It is something very different. It is the exercise of judgment. While it involves computation, such computation is based upon estimates of the service life and salvage value of any property to be depreciated, made in the light of conditions by which the property is affected, and of all

available engineering and other information with respect to prospective future conditions.

A system of accounting rules will direct the recording of depreciation after the estimate of the amount of it has been made, but it is not possible to devise an accounting rule which will determine the amount to be thus recorded.

The Bell Companies agree to the truth of this statement, as appears from the report of the Interstate Commerce Commission in *Depreciation Charges for Telephone Companies,* 118 I. C. C. 295, hereinbefore cited, to which they were parties. It is there said:

> "Upon one proposition all parties are agreed, and that is that the service lives of the same kind of property vary widely in different companies. It is impossible to lay down any general rule which will apply in the case of all companies or even in the case of a particular class of companies, owing to the different conditions which surround the use of the property in each individual case. * * * There seems, indeed, to be no way in which prospective service life for the future can safely be estimated through an automatic or mechanical process. The estimate must needs be made by combining the results of actual past experience with the best available engineering advice as to the probabilities of the future." (118 I. C. C. 295, 372, 373)

In the face of this situation, it is obvious that no method of accounting procedure can be prescribed which will determine what should be written into the accounts to cover depreciation without the intervention at some stage of some person or persons exercising judgment.

From this it necessarily follows that Section 20(5) of the Interstate Commerce Act, conferred upon the Interstate Commerce Commission two distinct powers, with respect to telephone companies. One was the power to prescribe *forms of accounts,* and the other was the power to determine *what classes* of property should be considered subject to depreciation and *what percentage rates* should be used

to determine the amounts to be written into the prescribed accounts as representing depreciation upon each class of depreciable property.

Instruction 80, relied upon by the appellant, does not purport either to prescribe depreciation rates or the use of designated factors, and the manner of their use, whereby such depreciation rates might be computed.

Instruction 80 leaves each utility free to estimate service values and service lives for itself, and these estimates determine the depreciation rates to be arrived at.

It results, therefore, that the full effect of the Uniform System of Accounts now in force, in so far as depreciation is concerned, is to provide for the recording of depreciation charges when determined, but not for the determination of them.

There is No Conflict Between the Nebraska Order and the System of Accounts Prescribed by the Interstate Commerce Commission.

Inasmuch as said Section 20(5) of the Interstate Commerce Act directs that depreciation charges for Federal depreciation accounting shall be prescribed by the Interstate Commerce Commission, any language contained in said Instruction 80 which attempts to delegate to the telephone companies the power to determine such charges as they will use for depreciation accounting is ineffective and mere surplusage.

Were it to be assumed, however, that the order which is contained in the prescribed System of Accounts is valid to the extent of determining the classes of depreciable property, the Nebraska order does not in any way conflict therewith, for the Nebraska Commission in said order has prescribed the same classes of depreciable property as the Interstate Commerce Commission has prescribed. (Rec. 20 and 213.)

The Nebraska order leaves the appellant entirely free

to keep its accounts as prescribed by the Interstate Commerce Commission. Seemingly the Interstate Commerce Commission's system is in effect for State purposes, for the Nebraska order indicates depreciable property by the same accounting numbers as does the Uniform System of Accounts. (Rec. 20 and 213.)

The only requirement of the Nebraska order complained of as conflicting is the requirement that, for State accounting and reporting purposes, the amount of depreciation shall be taken to be 3½ per cent of the investment in depreciable property located in Nebraska.

It is true that said Instruction 80 directs the preparation by the appellant of an estimated composite depreciation rate for each of the several classes of its depreciable property, and it is true that said Instruction 81 undertakes to make that estimated depreciation rate the depreciation rate to be observed in computing the amounts to be written into the appellant's accounts; but this attempt to delegate power to the appellant and other telephone utilities being ineffective, as without warrant of law, there are no prescribed rates of depreciation for the several classes of depreciable property which can produce a composite depreciation rate for all of such property. Hence there is no composite rate for all of such property with which the 3½ per cent rate prescribed by the Nebraska Commission can be in conflict.

The order of the Nebraska Commission was legislative in character, and in the absence of requirement therefor in the Nebraska law, no hearing was necessary preliminary to the making of the same.

In the instant case, a hearing was held pursuant to a notice given to the appellant, and the appellant appeared and was fully heard. The requirements of due process of law, if such requirements call for a hearing before the Commission and for due notice thereof, were fully complied with. We submit, however, that a hearing is not a necessary pre-

liminary to the prescribing of accounting regulations, by a regulatory body vested with the power to prescribe such regulations, unless the grant of power has been limited by a provision that it must be exercised only after a hearing.

All of the Federal regulatory commissions are empowered to prescribe accounting regulations without any provision for hearing.* In none of these cases is there any require-

*The essential portions of the various statutes are as follows:

The Interstate Commerce Act.

"Sec. 20(5). The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of this Act, including the accounts, records, and memoranda of the movement of traffic, as well as of the receipts and expenditures of moneys. The Commission shall, as soon as practicable, prescribe, for carriers subject to this Act, the classes of property for which depreciation charges may properly be included under operating expenses, and the percentages of depreciation which shall be charged with respect to each of such classes of property, classifying the carriers as it may deem proper for this purpose. * * * "

The Communications Act of 1934.

"Sec. 220(a) The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to this Act, including the accounts, records, and memoranda of the movement of traffic, as well as of the receipts and expenditures of moneys.

"(b) The Commission shall, as soon as practicable, prescribe for such carriers the classes of property for which depreciation charges may be properly included under operating expenses, and the percentages of depreciation which shall be charged with respect to each of such classes of property, classifying the carriers as it may deem proper for this purpose. * * *"

Public Utility Holding Company Act.

"Sec. 15(a). Every registered holding company and every subsidiary company thereof shall make, keep, and preserve for such periods, such accounts, cost-accounting procedures, correspondence, memoranda, papers, books, and other records as the Commission deems necessary or appropriate in the public interest or for the protection of investors or consumers or for the enforcement of the provisions of this title or the rules, regulations, or orders thereunder.

"(e) After the Commission has prescribed the form and manner of making and keeping accounts, cost-accounting procedures, correspondence, memoranda, papers, books, and other records to be kept by any person hereunder, it shall be unlawful for any such person to keep any accounts, cost-accounting procedures, correspondence, memoranda, papers, books, or other records other than those prescribed or such as may be approved by the Commission, or to keep his or its accounts, cost-accounting procedures, correspondence, memoranda, papers, books, or other records in any manner other than that prescribed or approved by the Commission.

"Sec. 20 (b). In the case of the accounts of any company whose methods of accounting are prescribed under the provisions of any law of the United States or of any State, the rules and regulations or orders of the Commission in respect of accounts shall not be inconsistent with the requirements imposed by such law or any rule or regulation thereunder; nor shall anything in this title relieve any public-utility company from the duty to keep the accounts, books, records, or memoranda which may be required to be kept by the law of any State in which it operates or by the State commission of any such State. But

ment for hearing before the Commission shall prescribe its accounting regulations. In each of the acts, however, careful provision is made for hearing when it is intended that the Commission shall act judicially.

The Interstate Commerce Commission has not acted judicially in prescribing accounting regulations. Its practice was stated by the Commission in its preliminary report in No. 14,700, dated August 15, 1929, as follows:

> "It should be noted that our function in prescribing accounting rules and regulations, including those governing the accounting for depreciation, is administrative. It may be, and in the past has been, performed without the aid of public hearings, and in securing the information necessary to its performance we are not confined to the limits of a formal record."

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this provision shall not prevent the Commission from imposing such additional requirements regarding reports or accounts as it may deem necessary or appropriate in the public inteest or for the protection of investors or consumers."

The Federal Power Act.

"Section 301(a) Every licensee and public utility shall make, keep, and preserve for such periods, such accounts, records of cost-accounting procedures, correspondence, memoranda, papers, books, and other records as the Commission may by rules and regulations prescribe as necessary or appropriate for purposes of the administration of this Act, including accounts, records, and memoranda of the generation, transmission, distribution, delivery, or sale of electric energy, the furnishing of services or facilities in connection therewith, and receipts and expenditures with respect to any of the foregoing: *Provided, however*, That nothing in this Act shall relieve any public utility from keeping any accounts, memoranda, or records which such public utility may be required to keep by or under authority of the laws of any State. The Commission may prescribe a system of accounts to be kept by licensees and public utilities and may classify such licensees and public utilities and prescribe a system of accounts for each class. The Commission, after notice and opportunity for hearing, may determine by order the accounts in which particular outlays and receipts shall be entered, charged, or credited. The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making authorizing, or requiring such entry, and the Commission may suspend a charge or credit pending submission of satisfactory proof in support thereof.

"Sec. 302(a) The Commission may, after hearing, require licensees and public utilities to carry a proper and adequate depreciation account in accordance with such rules, regulations, and forms of account as the Commission may prescribe. The Commission may from time to time, ascertain and determine, and by order fix, the proper and adequate rates of depreciation of the several classes of property of each licensee and public utility. Each licensee and public utility shall conform its depreciation accounts to the rates so ascertained, determined and fixed. * * *"

In *Accounting Rules for Telephone Companies,* No. 25705, 203 I. C. C. 13, the manner in which the Commission proceeded in the adoption of the Uniform System of Accounts for Telephone Companies, which is involved in this case, appears. The Commission held no hearings before prescribing the system. After the same was prescribed, various State commissions having asked for changes therein, the Commission set the matter down for a so-called hearing, but such hearing was confined to argumentative statements, without sworn testimony.

It appears that the question as to whether the Commission had proceeded properly, in promulgating a system of accounts for railroads, was raised in *Kansas City Southern Railroad* v. *United States,* 231 U. S. 423, and counsel for the Commission and for the United States met the issue squarely. Counsel for the Commission in his brief said:

> "In prescribing the classification of accounts, bookkeeping, and an annual balance sheet, the Commission was acting in purely a legislative capacity. The act did not require that any hearing be given to the carriers. Like Congress, the Commission was to inform itself upon the subject, and, in pursuance of the general instructions of Congress, contained in the act, was authorized to prescribe a uniform classification and system of accounts for all interstate carriers. The Commission was to fill in the details, and this involved a classification of the items going into the accounts. The proceedings by the Commission fall within the general category of administrative functions."

The Government brief, filed by the Assistant Attorney General, stated the Government's position as follows:

> "In dealing with such a question it is important to keep in mind that the function of the Commission in this class of matters is not even quasi judicial, but exclusively administrative, and so open to no review in any matter of opinion."

In that case the order of the Commission was sustained in both the United States District Court and in this Court. The District Court said:

> "The orders were made pursuant to a command of the statute. The Commission could have made them without consulting anyone, and the fact that the Commission received such letters as were offered in evidence was immaterial. * * *" (204 Fed. Rep. 641, 646.)

In the *Norfolk and Western Railroad* case, 287 U. S. 134, the Commission's order, which this court sustained, undeniably required the company to carry upon its books as non-carrier property certain coal mines which were purchased for, and actually devoted to, carrier uses. The Court said:

> "With great earnestness the appellant characterizes the order as in several aspects a denial of due process. It declares that by virtue of the Commission's mandate an unfair and improper rate base is fixed, and a capital asset properly to be taken into account for purposes of recapture is eliminated. But this is to ignore the fact that the order is one touching accounting merely; that before any rate base can be ascertained or any basis of recapture determined the carrier will be entitled to a full hearing as to what property shall be included; and not until the Commission excludes the assets in question from the calculation may the carrier assert the infliction of injury to its rights of property." (287 U. S. 134, 141.)

In *State Corporation Commission* v. *Wichita Gas Company*, 290 U. S. 561, the State commission had ordered subsidiaries of a holding company to cease setting up on their books of account as operating expense items, payments of 1¼ per cent of their gross earning to a holding company for managerial services. That the services were performed, and were of some value, seemingly was not open to ques-

tion, but this Court sustained the order of the Commission, saying in part:

> "We need not decide whether these provisions are repugnant to the Constitution or whether they are otherwise invalid. The invalidity of such an order is not of itself ground for injunction. Unless necessary to protect rights against injuries otherwise irremediable, injunction should not be granted. * * * Appellees in substance suggest that, unless now adjudged invalid and enjoined, the findings and directions of the commission in respect of their operating expenses and the fixing of rates will be binding upon them in later proceedings for the prescribing of rates to be charged by them for gas furnished to consumers and in suits involving the validity of such rates. But the commission's proceedings are to be regarded as having been taken to secure information later to be used for the ascertainment of reasonableness of rates. The order is therefore legislative in character. The commission's decisions upon the matters covered by it cannot be res adjudicata when challenged in a confiscation case or other suit involving their validity or the validity of any rate depending upon them. * * * And upon the issue of confiscation vel non they are entitled to the independent judgment of the courts as to both law and facts. * * * It results, therefore, that * * * the challenged provisions are merely preliminary steps in aid of investigations for the ascertainment of the reasonableness of appellees' rates, and they have no binding force in respect of payment to the pipe line company or rates to be charged consumers and cannot be res adjudicata. The decree in so far as it enjoins enforcement of the provisions of that order will be vacated." (290 U. S. 561, 568, 569, 570)

If the order involved in this case was within the jurisdiction of the Nebraska Commission, the accuracy of the depreciation rate prescribed thereby is not open to review in this proceeding. If at any time the accounts and reports which the appellant is required to keep or to make shall be made use of for the purpose of fixing its rates, or otherwise

in such manner as to affect its property rights, the appellant will then be entitled to resort to the courts for the vindication of any right which may be disregarded. Pending such action, however, it has no legal ground of complaint.

CONCLUSION.

The judgment of the Supreme Court of Nebraska should be affirmed.

Respectfully submitted,

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